THE GAGE OF LAND IN MEDIEVAL ENGLAND.[1]

II.

THE English gage of land with possession of the debtor until default is to all seeming developed later than the gage with immediate possession of the creditor; the origin of this later form of security for loans being directly connected with the history of the process of judicial execution.[2]

Before, however, taking up this phase of the development, we wish to tarry a moment in the realm of medieval "charges," "liens," "burdens" and "encumbrances" on land that are created for purposes other than the securing of debts owing to creditors. Here, in certain instances at least, a right *in rem* is created in favor of one who does not take immediate possession of the burdened land; but different opinions may perhaps be held as to whether in such cases there is really a gage of land in the sense of a security for a personal claim. Thus, for instance, the warranty of title to land conveyed may create a charge on other land remaining in the hands of the warrantor, and the endowment of the wife at the door of the church may create a charge on all the land of the husband. In such cases, should the feoffee be ousted or should the husband die in the lifetime of the wife, the land previously bound by the warranty or by the endowment may be followed into the hands of third persons and made to answer the claim of the feoffee or the widow. To

---

[1] Continued from 17 HARV. L. REV. 557.

[2] Franken, Das französische Pfandrecht im Mittelalter 7, and Brunner, Grundzüge der deutschen Rechtsgeschichte 189, 190, take this view as to the Germanic law on the Continent. 2 Heusler, Institutionen des deutschen Privatrechts 135, 143–150, maintains that both the gage with and the gage without the creditor's possession appear equally early in old German law, and that indeed there is no direct connection between judicial execution and the origin of the gage with debtor's possession. For views of other legal scholars see 2 Heusler, Institutionen 144, and Wigmore, The Pledge-Idea, 10 HARV. L. REV. 341–350. Although the present writer alone is responsible for views held in this paper, he wishes to express indebtedness to his friends Professor Gierke and Dr. Neubecker, of the University of Berlin, for suggestions as to the nature of the gage with possession of the debtor, more especially the German *Hypothek*.

give immediate possession of the burdened land to the feoffee or the wife would be needless and indeed without meaning; the creation of the charge, the right *in rem*, is all that is necessary.[1]

In the medieval period warranty is the obligation of defending the title to land conveyed, and, should the defense fail, of giving to the evicted owner other land of equal value in exchange, an *excambium ad valentiam;*[2] the warranty being generally enforced by voucher or by the writ of *warantia cartae*, sometimes it would seem by writ of Covenant.[3] Besides the warranty binding only the warrantor and his heirs, warranty may in the thirteenth century create also, as we have just stated, a charge or lien on other lands remaining in the hands of the warrantor that is enforceable against the whole world. In the words of Bracton: Non solum obligatur persona feoffatoris . . . , poterit etiam tenementum obligari cum persona tacite vel expresse.[4]

This lien or charge, this *obligatio rei*,[5] may arise, therefore, out of an express warranty or out of a tacit warranty. An express warranty binds a certain designated tenement.[6] A tacit warranty implied in a feoffment binds, says Bracton, all the other lands that the feoffor has on the day of the feoffment.[7] That the feoffee of the warrantor acquires a right *in rem* is shown by the fact that land bound by warranty passes to everyone with the charge. The land is bound in the hands of the warrantor's heirs. It may be followed into the hands of assigns, and even into the hands of the king and the chief lord, who has it as an escheat. Should the warranty fail and should the burdened land be called for to answer

---

[1] For the German law see 2 Heusler, Institutionen 135, 147, 148.

[2] See Glanvill, III.; Bracton, f. 257b–261b, 380–399b; Beames, notes to Glanvill, III., Beale's edition; Holmes, Common Law 372; 1 Gray, Cases on Property 416–419. Compare 2 Brunner, Deutsche Rechtsgeschichte 516; 2 Pollock and Maitland, Hist. Eng. Law 663.

[3] See Bracton, f. 399, and 2 Pollock and Maitland, Hist. Eng. Law 218, n. 4, 664. Compare Rawle, Covenants for Title, 5th ed., 12, 16.

[4] Bracton, f. 382. In the later Middle Ages a mere warranty would not bind the other lands of the warrantor in whatsoever hands they might come. To create a lien on the land it was necessary to bring an action of *warantia cartae* and get a judgment *pro loco et tempore*. See Rawle, Covenants for Title, 5th ed., 12, 13.

[5] See Bracton, f. 382, 388b, and the thirteenth-century annotations to Bracton's Note Book, pl. 748.

[6] Bracton, f. 382; Bracton's Note Book, pl. 748, and thirteenth-century annotations; Y. B. 20–21, Ed. I., pp. 359–361. See Maitland, Bracton's Note Book, pl. 748, note 7.

[7] Bracton, f. 382, 382b, 388, 388b; Bracton's Note Book, pl. 748, thirteenth century annotations.

the claim of the warrantor's feoffee, every possessor must give up the land.[1]

In the legal literature of the twelfth and thirteenth centuries the *dos* is represented as a gift from the bridegroom to the bride *ad ostium ecclesiae*[2] at the time of the marriage ceremony, and yet as a gift which the law compels the bridegroom to make.[3] The gift may take the form of a dower of certain definite lands, but never more than a third of all the lands of the husband; and in this form the dower is called a *dos nominata*.[4] A *dos rationabilis*, on the other hand, is in the twelfth century the dower of a third of all land in the freehold seisin of the husband on the day of the nuptials; and, when the husband fails to give a *dos nominata*, it is assumed by the law that he wishes to give a *dos rationabilis*.[5] In the time of Britton the wife has a right, in the case of a *dos rationabilis*, to a third of all the lands in the seisin of the husband during his entire life;[6] and this is the rule of the common law.[7]

In the time of Bracton the wife seems to acquire at once, by the giving of a *dos nominata*, "true proprietary rights" in the lands. Unless she has joined with her husband in the levying of a final concord before the king's justices, she is entitled, on his death, to recover the very land designated from any one who now has it in his hands. If the tenant be sued by the woman, he will vouch the heir of the husband. The heir will probably be obliged to warrant the gift of his ancestor, and, should he fail in this, he must give the evicted tenant a compensation in value out of other lands of the ancestor. This, however, does not con-

---

[1] See Bracton, f. 380–382b, 388, 388b; Bracton's Note Book, pl. 638, 748, 1024; Fleta, lib. VI. c. 23, § 17; Maitland, Bracton's Note Book, pl. 748, note 7; Holmes, Common Law 394, 395. Holmes, Common Law 395: "Fleta writes that every possessor will be held. There cannot be a doubt that a disseisor would have been bound equally with one whose possession was lawful." The various writs will be found very fully collected in Bracton, f. 380–399b.

[2] The endowment is at the door of the church to insure publicity and solemnity. See Coke on Littleton 34a; Beames, Translation of Glanville, Beale's ed. 94, n. 2; 2 Pollock and Maitland, Hist. Eng. Law 374, 375.

[3] Compare Co. Lit. 30b, 31a.

[4] In the later Middle Ages the *dos nominata* may be more than a third of all the lands. See Littleton, §§ 37, 39; 2 Pollock and Maitland, Hist. Eng. Law 421, 425, 426. Compare Co. Lit. 33b.

[5] Glanvill, VI. 1, 2, 17; Bracton, f. 92; 1 Reeves, Hist. Eng. Law 155, 156; 2 Pollock and Maitland, Hist. Eng. Law 420, 421, 425.

[6] 1 Nichols, Britton, pp. xli, xlii, and 2 *idem* 238, 242; 2 Pollock and Maitland, Hist. Eng. Law 421.

[7] Littleton, § 37; Co. Lit. 33b. Compare 2 Reeves, Hist. Eng. Law 577–579.

cern the wife at all. Her right is to the land named by her husband and she can evict the tenant.[1]

If one-third of the land that the feoffee holds under the feoffment from the husband be claimed by the widow as *dos rationabilis*, and if the feoffee vouch the heir to warranty, the widow must see that the heir appears in court, for the heir is also the warrantor of her dower. If it be confessed by the heir that sufficient other lands have come to him to endow the widow, the feoffee will be allowed to keep his land and the widow will be given a judgment against the heir. Should, however, the heir have no other lands, then the widow can recover a third of the land held by the feoffee. The feoffee will get judgment against the heir; and, on the death of the woman, the feoffee will get back the land that the widow has been holding as dower. As expressed by Pollock and Maitland: "The unspecified dower is therefore treated as a charge on all the husband's lands, a charge that ought to be satisfied primarily out of those lands which descend to the heir, but yet one that can be enforced, if need be, against the husband's feoffees."[2]

Again, it is not uninstructive to observe that feudal services and rents-service are in the medieval law a "charge" or "burden" on the land held by the tenant.[3] Should the tenant make default, the lord may not only distrain the chattels that are on the encumbered land, but he may reach the land itself. The tenement may be forfeited to the lord; or, the lord may enter into possession and reduce his claim out of the fruits of the land; or, he may enter and hold the land as a mere distress, with no right to keep it as a forfeiture and with no right to satisfy himself out of the profits.[4]

---

[1] Bracton, f. 299b; 2 Pollock and Maitland, Hist. Eng. Law 422, 423. On the legal nature of the wife's right in the land before the husband's death, compare Bracton, f. 300b; Beames, Translation of Glanville, Beale's ed., 97, n. 3. See Glanvill, VI. 3.

[2] Bracton, f. 300; 2 Pollock and Maitland, Hist. Eng. Law 423, 426. For the writs of the dowager see Glanvill, VI.; Bracton, f. 296–317b; 2 Britton, liv. V., c. IV.–XIII.

[3] See, for instance, Stat. Glouc., 6 Ed. I. c. 4; Stat. West. II, 13 Ed. I. c. 21; 1 Britton, liv. II. c. XVIII, § 10; Holmes, Common Law 388. Similar in its effect is the so-called *Abmeierungsrecht* in the case of the German *Erbpacht* and the *emphyteusis* of Roman law and the German common law. Compare also von Amira, Das Altnorwegische Vollstreckungsverfahren (1874) 314 *et seq.*

[4] Note, further, the special significance of the rent-charge in the English medieval period. Compare 2 Heusler, Institutionen 150–153.

By the feudal law failure of the tenant to perform the services results in a forfeiture of the land; but only after the tenant has been adequately warned and after judgment of the lord's court. If the tenant be summoned three times without responding, the feudal law enables the court to put the lord into possession for a year. Should the tenant redeem within the year, possession is restored to him; but should he not redeem, he loses the land.[1]

Forfeiture may also be enforced by writ of *cessavit per biennium*, introduced by statute in the reign of Edward I. If the tenant fail to perform his services or pay his rent for two years, and if there be insufficient chattels for a distraint, the lord may obtain a writ of *cessavit* out of chancery. This writ enables the lord, if the tenant still fail to redeem by tendering his arrears and damages before judgment, to recover the land or fee itself in demesne. The land thus adjudged to the lord is forfeited for ever, for the tenant has now no right to redeem.[2]

What practically amounts to forfeiture is also found in the Kentish custom of *gavelet*. If the tenant of land held in gavelkind falls into arrears with his services and rents, the lord is to get permission of his own Three-Weeks-Court to distrain the chattels of his tenant found upon the tenement; and the lord in thus seeking to distrain is to be accompanied by good witnesses. This attempt to distrain is to be continued for four sessions of this court of the lord, and if before the fourth court sufficient chattels cannot be found, the court then awards that the lord may take the tenement into his hands *en noun de destresse ausi cum boef ou vache*. The lord may keep the land in his hands a year and a day, but without fertilizing it; and within this period the tenant may, if he pay his arrears and make reasonable amends for the withholding, enter once more into his land. If, however, the tenant do not thus redeem, the lord may then make all the proceedings public at the next county court, and in the session of his own court following this public declaration it is finally awarded that the lord may enter into the tenement and

[1] See 2 Chron. Abingd. 128; Wright, Tenures 197–199; Gilbert, Rents 3, 4; Robinson, Gavelkind 195; 2 Reeves, Hist. Eng. Law 186; 1 Pollock and Maitland, Hist. Eng. Law 354. See also Placita Ang.-Norm. 97.

[2] See Stat. Glouc., 6 Ed. I. c. 4; Stat. West. II, 13 Ed. I., c. 21; F. N. B. f. 208 H, 209, 210 A.; Coke, 2 Inst. 295, 400, 460; 3 Blackstone c. 15, § I; Co. Lit. 47a, n. 4; Co. Lit. 142a, n. 2; Co. Lit. 143b, n. 5; Booth, Real Actions 133–135; Wright, Tenures 202; Robinson, Gavelkind 193–195; 1 Pollock and Maitland, Hist. Eng. Law 353.

cultivate it, taking the profits as in his own demesne (*si come en son demeyne*).[1]

If now the tenant comes after this award of the lord's court and wants to get back the tenement, thus treating the whole transaction as in effect a mere pledge *quousque*, he is obliged, before this can be done, to perform the services and pay the rent, and must in addition make proper amends to the lord for the withholding of the services or rent.[2]

The copies of the custumal differ, however, as to just what amends the tenant must make, a good deal depending apparently upon an old Kentish by-word printed in the custumal; and owing, it would seem, to this uncertainty as to the proper reading of this by-word, it has always been a mooted question whether the Kentish *gavelet* was intended as a continuing security, with a right of redemption even after adjudication to the lord, or whether there was an absolute forfeiture. According to the generally accepted reading of the by-word, the tenant seems to have a theoretical right to redeem by paying the arrears nine — or eighteen? — times over, and in addition a wergild of £5. As legal scholars have pointed out, this is practically an impossible condition, and there is in reality a forfeiture of the tenement, though the ancient law in its forbearance is loath to say so.[3]

Our sources leave us in no doubt, however, that in London the medieval procedure by *gavelet* may result in absolute forfeiture. According to the Statute of Gavelet,[4] usually attributed to the tenth year of Edward II.'s reign, if the rents be in arrear, the lord shall first distrain all the chattels on the land, and then, if these be insufficient, he may begin proceedings in *gavelet* by a writ *de consuetudinibus et servitiis*. If the tenant deny the fact that he owes services or rents, the lord must then prove in court by witnesses that he is seised of the services or rents now in arrear; and if this be proved, the lord shall then recover his tenement in demesne by

[1] *Consuetudines Cantiae*, 1 Statutes of the Realm 224a, 225; Lambarde, Perambulation of Kent 498, 499, 526–528; 2 Reeves, Hist. Eng. Law 186, 187; Robinson, Gavelkind 195, 196. Compare Co. Lit. 142a, n. 2.

[2] *Consuetudines Cantiae*, 1 Statutes of the Realm 225; Lambarde, Perambulation 528; Robinson, Gavelkind 196.

[3] For details as to this question see *De Wandlesworth's Case*, reported in Robinson, Gavelkind 197; 1 Statutes of the Realm 225, n. 1; Lambarde, Perambulation 449; Robinson, Gavelkind 196–202; 1 Pollock and Maitland, Hist. Eng. Law 355, n. 1. Compare 2 *idem* 591–593.

[4] *Statutum de Gaveleto in London*, 1 Statutes of the Realm 222; Robinson, Gavelkind 194; Co. Lit. 142a, n. 2; 2 Reeves, Hist. Eng. Law 186, 187.

judgment of court. If, however, the tenant acknowledge the services or rents and the arrears, then by judgment of court the arrears shall be doubled, and the tenant must also pay a fine to the sheriff for the wrongful withholding of the rents. If the tenant do not come, after due summons, to render the doubled arrears and to pay the fine, either because he is unwilling or unable to make satisfaction, the land shall be delivered to the lord by the court to be kept in his hands for a year and a day. Within this period the tenant may redeem his land by rendering the doubled arrears and paying the fine. But if he fail thus to redeem within the year and day, the land shall then by judgment of court be forfeited to the lord for good and all. The land shall then be called *forschoke*, because, for default in the services, it shall remain to the lord for ever in demesne.[1]

The common law will not allow forfeiture of the land for default of the tenant in performing his services or paying his rent; to effect a forfeiture it is necessary to introduce from the Roman system the writ of *cessavit per biennium*, which we have just adverted to. All that the king's court in the days of Glanvill and Bracton will permit is a *simplex namium* of the land. The lord must first distrain the chattels of the tenant; and only after this has been done may the lord get a judgment from his seignorial court permitting him to distrain the tenant by his land. By virtue of this judgment the lord is able to seize the land and to hold it as a *simplex namium*, as a means, that is, of compelling the tenant to render the arrears. The lord cannot obtain the land as a forfeiture, and he has even no right to take the profits. The tenant retains his right to redeem; and whenever he is willing and able to satisfy the claim of the lord, the lord must give back the land.[2]

In the law set forth by Littleton and Coke it is sometimes possible for the one entitled to rent to satisfy his claim out of the profits of the land: thus, where a feoffment is made reserving a certain rent, upon the condition that, if the rent be in arrear, the feoffor or his heir may enter and hold the land until he be satisfied or paid

---

[1] Cowel, Interpreter (1727), *s. v. Foreschoke:* "*Foreschoke* (*Direlictum*) signifies originally as much as *forsaken* in our modern language."

[2] Glanvill, IX, 8; Bracton, f. 205b, 217, 218; Bracton's Note Book, pl. 2, 270, 348, 370; Wright, Tenures 199–201; Co. Lit. 142a, n. 2; 1 Pollock and Maitland, Hist. Eng. Law 352–355. Compare Gilbert, Rents 3, 4. It is true that feoffors and feoffees may expressly agree that, on default, the feoffor may by re-entry get back the land; but such agreements are, before the middle of the thirteenth century, very rare indeed. 1 Pollock and Maitland, Hist. Eng. Law 352.

the arrears. In this case, says Coke, "when the feoffor is satisfied either by perception of the profits or by payment or tender and refusall or partly by the one and partly by the other, the feoffee may re-enter into the land." [1]

The history of gages to secure loans where the debtor remains in possession of the gaged land until default, begins with the coming in of the Jews and of foreign merchants from Italy and other countries. In the centuries that immediately follow the Norman Conquest it is English policy to foster industry and commerce. Foreigners are induced to visit the realm, and it is sought to make up for deficiencies in English production by bringing in the goods of other countries. Systems of banking and insurance take root. In the interest of creditors new and more efficient processes of judicial execution are established. The Exchequer of the Jews is set up as a branch of the Great Exchequer. A system of registering debts owing to Jewish creditors and the gages that secure them is perfected, this system allowing a free buying and selling of Jewish obligations and efficient execution on default.[2] The needs of other creditors are supplied by giving them, on judgments or enrolled recognizances of debt, new writs of execution in addition to the old common law writs of *fieri facias* and *levari facias;* these new writs enabling the creditor to reach the lands and chattels and body of the debtor. The writ of *elegit* is introduced by the Statute of Westminster the Second for creditors generally. Merchant creditors, if they get their debtors to make recognizances of debt before courts of record or certain public officials, may obtain, on the default of their debtors, even more effective remedy. Merchant creditors may reach, among other things, not only half the land, as under the Statute of Westminster the Second, but all the land of the debtor. These merchant securities are known as "statutes merchant" and "statutes staple," the former being introduced by the Statute of Acton Burnel and the Statute of Merchants in the reign of Edward I., the latter by the Statute of the Staple under Edward III. The advantages of the merchant securities are given to all creditors by the Statute 23 Henry VIII.,

[1] Lit. § 327; Co. Lit. 202b, 203a. See Co. Lit. 205a, and marginal note (d).

[2] See, further, 3 Hoveden 266, 267; Bracton, f. 13, 386b; 2 Blackstone, c. 20; Plowden, Usury 95–98; Horwood, Y. B. 32–33 Ed. I., pp. xii, xlii; Jacobs, Jews of Angevin England; Gross, Exch. of the Jews (printed in 1 Publications of Anglo-Jewish Hist. Exhibition); 1 Pollock and Maitland, Hist. Eng. Law 468–475, 2 *idem* 123, 124; Rigg, Jewish Exch. (Seld. Soc.) ix-lxii; Exch. of the Jews, 18 L. Quart. Rev. 305–309.

introducing the security known as a "recognizance *in the nature of a statute staple*."[1]

A gage of land with possession of the debtor to secure money obligations is therefore rendered necessary and possible by this development of credit and of processes of judicial execution; and, very largely for the benefit of the mercantile classes, an hypothecation of land may now be created by judgment and by the registration or enrolment of contracts under seal. The publicity essential to this form of gage is thereby obtained; but it should be well observed that the new security breaks in upon the old law with its restraints on alienation and its requirement that livery of seisin is necessary to the conveyance of rights in land. The old feudal polity is attacked and attacked successfully by commercialism.

The gage of lands and tenements to Jewish creditors who do not take possession arises, then, on the registration of a written contract under seal before public officials at the Jewish Exchequer or in certain towns.[2]

To secure principal and interest the debtor may thus hypothecate certain specific lands;[3] and lands of any tenure are chargeable until the year 1234, when the Crown's demesne estates held in socage or villeinage are exempted.[4]

---

[1] See, further, preambles to Stat. Act. Burnel, 11 Ed. I., and Stat. Merchant, 13 Ed. I.; Coke, 2 Inst. 677–680, 4 Inst. 237, 238; Bac. Abr. tit. Execution; Comyn, Digest, tit. Obligation (K); Wright, Tenures 170–171; 2 Blackstone, c. 10, § V, c. 20, § 2, 3 *idem* c. 26, § 5, 4 *idem* c. 33, § III; 2 Reeves, Hist. Eng. Law 71, 72, 276–279, 3 *idem* 289; Coote, Mortgage, 2 ed., 66; Rogers, Indus. and Com. Hist. Eng. (1892) 71, 72; Cunningham, Eng. Indus. and Com. during Early and Middle Ages, (1896) 222, n. 3, 281–283, 290, 316, 317; Cunningham and McArthur, Eng. Indus. Hist.; 2 Pollock and Maitland, Hist. Eng. Law 203, 204, 596, 597; Brodhurst, Merchants of the Staple, 17 L. Quart. Rev. 62–74; Carter, Eng. Legal Institutions (1902) 250–270.

The forms of gage described by Glanvill and Bracton seem to be, as we have already explained, securities with immediate possession of the creditor. For the view that the gage with possession of the debtor may be found in these writers, see, however, 2 Phillips, Eng. Reichs- und Rechtsgeschichte 239, 240; 2 Glasson, Histoire du droit et des institutions de l'Angleterre 313–316; Chaplin, Story of Mortgage Law, 4 HARV. L. REV. 6 *et seq.*

[2] See on this system of *archae* and *rotuli* the authorities cited in n. 2, p. 43. *supra*. Compare Rigg, Jewish Exch. (Seld. Soc.), pp. xiii, xxxvii, 136 (*s. v. stallare*). On the enrolment of documents in the Great Exchequer see 1 Hall, Red Book of Exchequer, pp. xix-xxxv.

[3] See Jacobs, Jews 57, 66, 67, 70–72, 99, 215, 216, 220, 221, 234; Jewish Exch. (Seld. Soc.) 45. On the gaging of rents and chirographs of debt see Jacobs 99; Jewish Exch. (Seld. Soc.) 28, 29, 33, 34, 43–45.

[4] Rigg, Jewish Exch. (Seld. Soc.) p. xiii.

On the other hand, the gage is often in terms a gage of all the debtor's property, movable and immovable. Sometimes indeed the debtor says that, should he make default, all his goods, movable and immovable, may be distrained.[1] Apparently all such recognizances or bonds create, as regards movable property, merely a right to distrain the chattels that are in the hands of the debtor, not an hypothecation or right *in rem* that enables the creditor to follow the chattels into the hands of third persons.[2] We have evidence, however, that the gaging of land to Jews by registered contract gives rise to a right *in rem* for purposes of security. If the alienee of land bound by the debt refuse to pay the debt with interest, the *seisina* of the land in his hands will be given to the Jew.[3]

On default in payment the creditor may bring his action of Debt; and execution will be by summary processes.[4] If his security on the land be enforced, the creditor will be given *seisina* by the court.[5] He may either sell the lands after possession for a year and day, in which time the debtor has a chance to redeem;[6] or, he

---

[1] See Jewish Exch. (Seld. Soc.) p. xix, n. 1, 33, 34, 92–94, 102; Webb, Question, App. Nos. 19, 30, 31. See further Jewish Exch. (Seld. Soc.) 67, 68, 91, 93.

[2] The Jewish gage of chattels seems to be a gage with immediate possession of creditor. See an article by the present writer entitled The Exchequer of the Jews, 18 L. Quart. Rev. 308. Compare Rigg, Jewish Exch. (Seld. Soc.) p. xiii.

[3] See the cases in Jewish Exch. (Seld. Soc.) 18, 63; *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221; 1 Madox, Hist. Exch. 233, n. (y). Compare the case of *De Sawston v. De Senlis*, Jewish Exch. (Seld. Soc.) 53. The alienee may, however, vouch his warrantor. See the case in Jewish Exch. (Seld. Soc.) 63.

[4] Our sources are full of actions of Debt. See, *e. g.*, Tovey, Anglia Judaica 42, 43, 50; Prynne, Demurrer, part 2, p. 11; Cole, Documents of 13th and 14th Centuries 285–332; Jewish Exch. (Seld. Soc), *s. v.* Debt.

The process of execution laid down by *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221, 221a, is very much like that under the Stat. West. II, c. 18.

[5] See Jacobs, Jews 57, 90, 231 (and compare 233), 234; Webb, Question, App. No. 4; Bracton's Note Book, pl. 301; Plac. Abb. (Rec. Com.) p. 58; "Exchequer Receipt Roll, 1185" (with preface by Hubert Hall) 31; *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221a; Goldschmidt, Geschichte der Juden in England 69, n. 37; Jewish Exch. (Seld. Soc.) pp. xiii, xxxviii, n. 1, 63, and Index *s. v.* Seisin. Compare Rigg, Jewish Exch. (Seld. Soc.) p. xxxv. Similarly, the assignee of the Jewish creditor may obtain *seisina* of the gaged land *per praeceptum Domini Regis*. See Webb, Question, App. No. 6.

[6] 1 Foedera 51 (see Jacobs, Jews 134–138); 1 Rotuli Chartarum, ed. Hardy, 93 (see also Tovey, Ang. Jud. 62–64, and Jacobs, Jews 212–214); Goldschmidt, Juden in England 21, 22; Rigg, Jewish Exch. (Seld. Soc.) xiii. See Webb, Question, App. No. 14. Richard I.'s *Carta quâ plurimae libertates Judeis conceduntur & confirmantur* (1190), 1 Foedera 51: Et liceat predictis Judeis quiete vendere vadia sua, postquam certum erit illos ipsa per unum annum integrum & unum diem tenuisse.

may hold the lands until he has satisfied himself out of the rents and profits.[1]

While the land is in his hands the creditor has not feudal seisin, not the *seisina* of one in the scale of lords and tenants, but *seisina ut de vadio*, seisin as a gagee;[2] and this seisin of the Jew or of his assignee is protected by the courts.[3]

From the sources that have come under our notice, it is not clear whether the right of sale given by the charters of Richard I. and John indicates that the land is at the end of the year and day completely forfeited to the creditor, his title to the land being perfected by the acquiring of this right of sale,[4] or whether the creditor is obliged to account to the debtor for the proceeds of the sale over and above the amount of the debt and interest. The answer may lurk in records of the Jewish Exchequer that are still unprinted. In the thirteenth century one would certainly expect to find an accounting in cases of sale, quite as much as in cases where the creditor is reducing his claim by taking the profits of the land.

If indeed the creditor satisfy himself out of the rents and profits, he holds the land as a *vivum vadium*. The debtor may call upon the creditor to account by the action of Account; and if the creditor has taken more than his debt and interest, this surplus belongs to the debtor. If the land be freehold, the creditor is impeachable for waste, and apparently no laches or lapse of time is pleadable in bar to an action of Account.[5]

The gage of land with possession of debtor to creditors other than Jews arises on judgment or on the enrolment of recognizances of debt before courts of record or before properly authorized public officials of towns, staples, and fairs. The judgment or recognizance under the Statute of Westminster the Second binds lands belonging to the debtor at the time of the judgment or the recognizance and also, according to later law, lands that he after-

[1] See Jewish Exch. (Seld. Soc.) xiii, xxxviii, n. 1, lvii, 19–27, 43–45, 89–91; *Chapitles Tuchaunz La Gyuerie*, Jewish Exch. (Seld. Soc.) lvi; *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221a; Jacobs, Jews 233.

[2] See Jacobs, Jews 231; Webb, Question, App. Nos. 4, 6; Rigg, Jewish Exch. (Seld. Soc.) xiii, xxxviii, n. 1.

[3] See Plac. Abb. (Rec. Com.) 64, 82, 175; Bracton's Note Book, pl. 301, 1825; Jacobs, Jews 191, 234; Webb, Question, App. No. 6.

[4] Compare 2 Pollock and Maitland, Hist. Eng. Law 90–92; Wigmore, The Pledge-Idea, 10 HARV. L. REV. 335. Sometimes, by collusion with powerful personages, it was contrived to defer the redemption indefinitely, "thus compassing by sharp practice what we now call foreclosure." Rigg, Jewish Exch. (Seld. Soc.) xxxvii.

[5] See n. 1, *supra*. The Jews were expelled from England in 1290.

wards acquires; though with the writ of *elegit*, until recent times, only a moiety of the lands may be taken from the debtor or from one who has purchased the charged land from the debtor. Under the Statute of Merchants and the other acts already referred to, the enrolled "statute" or recognizance, accompanied by the drawing up of a sealed obligation, binds in its earlier history all the lands owned by the debtor at the time of making the recognizance; and, according to later law, lands subsequently acquired by the debtor are also charged by recognizance.[1]

On default in payment the creditor may bring his action of Debt on the personal obligation.[2] If, however, advantage be taken of the special remedies on the recognizance or "statute," possession of land bound by the lien — whether the land be now in the hands of the debtor himself, the debtor's heir who is of age or the debtor's feoffee — is delivered to the creditor, his personal representatives or assigns, to be held until the amount of the claim is levied from the rents and profits or paid outright, or until the debtor's interest in the land expires.[3]

---

[1] See Stat. Acton Burnel, 11 Ed. I.; Stat. Merc. 13 Ed. I.; Stat. West. II, 13 Ed. I., c. 18; Stat. 5 Ed. II, c. 33; 14 Ed. III., Stat. 1, c. 11; Stat. Staple, 27 Ed. III., Stat. 2, c. 9; Stat. 36 Ed. III., c. 7; Stat. 10, Hen. VI., c. 1; Stat. 23 Hen. VIII., c. 6; Stat. 32 Hen. VIII., c. 5; Stat. 2 & 3 Ed. VI., c. 31; Reg. Brev. f. 146–153, 299; Viner, Abr. *tit.* Stats. Merchant &c.; Bac. Abr. *tit.* Execution (B); 1 Ro. Abr. 311, 892; 2 Ro. Abr. 466, 472, 473; Bro. Abr. *tit.* Stat. Merc. & Stat. Staple; F. N. B. f. 266, 267 D.; Coke, 2 Inst. 395, 396, 679; Co. Lit. 289b, 290a; Wright, Tenures 170, 171; 2 Lilly, Pract. Reg. 658, 659; 2 Blackstone, c. 10, § IV., V.; 2 *idem* c. 20, 3 *idem* c. 26, § 4, 4 *idem* c. 33, § III; Co. Lit. 191a, n. VI. 9; 2 Tidd, Practice 1101, 1102; 2 Wms. Saunders, 197, n. (a), 199, n. (c), 208, n. (u), 217, n. (3), 218, n. (c); 2 Reeves, Hist. Eng. Law 96, 97, 3 *idem* 289; Williams, Real Prop. 262, 263, 266, 283, 284, 371, 372, 407, 408. On the modern law see Coote, Mortgage, 2nd ed., 68, 72, 82, 83; Williams, Real Prop. 261 *et seq.*

Quite in the spirit of the medieval law it seems that chattels, though liable in the hands of the debtor on a "statute merchant" or "statute staple," cannot be followed into the hands of purchasers. See 2 Ro. Abr. 472; Bac. Abr. *tit.* Execution (B).

[2] See Stat. Merc. 13 Ed. I.; Stat. 23 Hen. VIII., c. 6; F. N. B. f. 122 D; Viner, Abr. *tit.* Stat. Merc. &c.; Bro. Abr. *tit.* Stat. Marc. &c.; Bac. Abr. *tit.* Execution (B). As to a "statute staple" see, however, Viner, Abr. *tit.* Stat. Merc. &c.; 2 Lilly, Pract. Reg. 659.

[3] Stat. West. II, c. 18; Stat. Merc. 13 Ed. I.; Stat. Staple, 27 Ed. III., c. 9; Y. B. 15 Ed. III., 327; Y. B. 15 Hen. VII., 16; Y. B. 2 Rich. III., 8; Y. B. 17 Ed. III., 3; Reg. Brev. f. 299; F. N. B. f. 130–132, 266 A.; F. N. B. 8 ed. 304, n. (a); 1 Ro. Abr. 311; 2 Ro. Abr. 472–475, 478; Bro. Abr. *tit.* Stat. Marc., pl. 16, 43, 49, 50; Viner, Abr. *tit.* Stat. Merc. &c.; Bac. Abr. *tit.* Execution (B); Coke, 2 Inst. 395, 396, 471, 678–680; Co. Lit. 290a; 2 Blackstone c. 10, § 5, 3 *idem* c. 26, § 4; 2 Wms. Saunders, 220, n. (3), 221, n. (3), 260, n. (6); 2 Tidd, Prac. 1083, 1084; Wms., Real Prop. 268. Compare Wms., Real Prop. 281, 282. On the judgment creditor's right of sale in modern law see Wms., Real Prop. 268.

In the enforcement of the lien, therefore, the creditor holds the land as a "gage" in the nature of the *vivum vadium*.[1] The acts and the writs framed upon them state that the creditor holds or is seised of the land *en noun de frank tenement, ut liberum tenementum;* at the same time giving him, his executor, administrator, or assign, the freeholder's possessory actions of Novel Disseisin and Redisseisin. Indeed, the Statute of the Staple explicitly declares that the merchant creditor is actually to have an "estate of freehold" (*estat de franktenement*). In legal literature the creditor in possession is referred to as a "tenant by statute," and it is said that he has an "estate by statute," a "conditional estate," an "estate defeasible on condition subsequent."[2] Notwithstanding all this, however, the exact legal nature of the creditor's interest in the land has not yet been fully stated.

One might be inclined to think at first sight that the intention of the medieval legislator was actually to give the creditor an estate of freehold; and from the uncertainty of the holding, which was in reality *quousque*, it would seem perhaps that these "estates by statute" ought, in strict legal theory, to have been treated as freehold estates.[3] The law stopped short of this, however. The acts were interpreted to mean that the creditor has not a "freehold estate" descendible to the heir, but a "chattel real" going to the personal representative on the creditor's death.[4] In the quaint language of Lord Coke, the *ut* of the expression *ut liberum tenementum* is merely "similitudinary," the tenant by statute having a "similitude of a freehold, but *nullum simile est idem*."[5]

The creditor's interest in the land being thus regarded by the law as a chattel real protected at the same time by the possessory actions of the freeholder, the commercial classes, for whose benefit these securities were chiefly introduced, gained thereby two very significant advantages. The holding of the creditor, his personal representatives or assignees, was perfectly secure; for, if ousted

---

[1] See Coke, 2 Inst. 679, note; 2 Blackstone c. 10, § IV.

[2] See Reg. Brev. f. 299; Rastell, Entries, 543, 545; F. N. B. f. 178 G, 189 I; 2 Ro. Abr. 475; Coke, 2 Inst. 396; 2 Blackstone c. 10, § IV., V., 3 *idem* c. 26, § 4; 2 Wms. Saunders 203, n. (1); Wms., Real. Prop. 268.

[3] See Butler's note to Co. Lit. 208a; Leake, Digest 205. Compare F. N. B. f. 178 G.

[4] 28 Ass. pl. 7; F. N. B. f. 178; Coke, 2 Inst. 396; Co. Lit. 42a, 43b; 4 Co. 82a, *Corbet's Case;* 2 Blackstone ch. 10, § V.; Butler's note to Co. Lit. 208a; Leake, Digest 205.

[5] Co. Lit. 43b.

from the land, their seisin might be recovered by an assize.[1] Again, on the creditor's death, not only the debt but its security thus went to the creditor's executor, not to his heir; the law, says Blackstone, "judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in them, to whom the debts if recovered would belong."[2]

The creditor in possession has, therefore, the freeholder's possessory actions; but at the same time the debtor remains seised of his freehold estate, and should the creditor be ousted, the debtor too may bring his assize of Novel Disseisin, for he has thus been disseised of his free tenement. As soon, however, as either the debtor or the creditor recovers possession, the writ of the other shall abate.[3]

As soon as the amount of the creditor's claim is either levied by the creditor out of the rents and profits or paid outright by the debtor, the debtor or the feoffee of the debtor is again entitled to the land now freed from the lien.[4] It seems that in certain very rare cases the conusor has a right of re-entry. The usual method of regaining possession, however, is by bringing a writ of *scire facias;* and by a special form of this writ the conusee may be compelled to restore the issues over and above the sum due.[5]

The medieval gage of land with possession of the debtor until default is, accordingly, either a gage of certain specific lands or a gage of all the lands of the debtor, the security being created by a contract under seal and of record.[6] Looking at execution or the

---

[1] Compare Savigny's theory as to the gagee's "derived possession" (*abgeleiteter Besitz*). For the literature and a criticism of the theory see 1 Dernburg, Pandekten (1900) § 172. See also 2 Puchta, Institutionen (1893) § 229; 3 Dernburg, Das bürgerliche Recht (1904) § 10.

[2] See Stat. Merc. 13 Ed. I.; F. N. B. f. 130, 131; Co. Lit. 43b; 2 Blackstone ch. 10, § V.; Butler's note to Co. Lit. 208a. In Butler's note to Co. Lit. 208a these principles as to the nature of the tenant by statute's interest in the land are compared with the rules of Equity in regard to the classical mortgage by conditional feoffment.

[3] F. N. B., 8th ed. 412, n. (e), citing 12 Hen. 6, 4.

[4] See Stat. Merc. 13 Ed. I.; Coke, 2 Inst. 396, 678, 679; and authorities cited in n. 1, p. 47, *supra.*

[5] See Coke, 2 Inst. 679, note; Viner, Abr. *tit.* Stat. Merc. &c. On the doctrine of Equity as to an accounting by the conusee, see Shep. Touch. 357, n. (i).

Williams, Real Property (1901) 226, n. (e): "Statutes merchant and staple, and recognizances in the nature of a statute staple were modes of charging lands with the payment of a debt under certain statutes, which, having long been obsolete, were repealed in 1863."

[6] One of the most significant features of the modern development is the transformation of the old mortgage of Littleton and the classical common law into a form of

enforcement of the gage on default, we may, furthermore, classify such securities as usufruct-gage and as property-gage. The creditor may reduce his claim out of the rents and profits only; or he may be entitled to the *res* itself. The principle of the usufruct-gage underlies both gages to Jews and securities created by "statutes" or recognizances. In the right of sale given to Jewish creditors one may see the principle of the property-gage, although whether this right of sale indicates merely that the land is forfeited, or whether, on sale, the surplus must be given to the debtor, is not clear. It is, furthermore, worth observing that, should the debtor's interest in the land expire while the land is in the hands of the creditor under a "statute," there is really a forfeiture of the debtor's interest.

It will be seen, therefore, that whether the medieval creditor take immediate possession or only on default of the debtor, the principle is the same. In either case the security is a usufruct-gage or it is a property-gage, or it is indeed a combination of the two. Though the tracing of the development down to our own day lies beyond the scope of the present paper, it is believed that this very same conception lies at the basis of much of the modern English law.[1]

Harold D. Hazeltine.

---

security where the debtor usually remains in possession until default and where, instead of foreclosure, the mortgaged land may under certain circumstances be sold, either under a power of sale or by order of the court, the surplus going to the debtor. See, further, Franken, Französisches Pfandrecht, 8, 9, 164–170; 5 Glasson, Histoire du droit et des institutions de l'Angleterre, 485; 6 *idem* 385–406; Williams, Real Property (1901) 527–559.

[1] In modern German law it is possible to satisfy the claim of the creditor out of the fruits of the land (*Zwangsverwaltung*) or out of the substance of the *res* itself (*Zwangsversteigerung*). See *Das Reichsgesetz über die Zwangsversteigerung und Zwangsverwaltung* of March 24, 1897, revised May 20, 1898.